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NO.

Supreme Court, U.S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1987

GLORIA HILL, Wife of/and
THOMAS J. CLANTON,

PETITIONERS

versus

THE CHILEAN LINE, VESSEL S. S. RENAICO
and
COMPANIA SUD-AMERICANA DE VAPORES,

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
TO THE FIFTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

I.

Were petitioners, Gloria Hill, wife of/and Thomas J. Clanton, unconstitutionally denied of their Seventh Amendment right to trial by jury under the particular facts of this civil action?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

GLORIA HILL, Wife of/and
THOMAS J. CLANTON,

PETITIONERS

versus

THE CHILEAN LINE, VESSEL S. S. RENAICO
and
COMPANIA SUD-AMERICANA DE VAPORES,

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
TO THE FIFTH CIRCUIT

MAY IT PLEASE THE COURT:

Gloria Hill, wife of/and Thomas J. Clanton, plaintiffs in the United States District Court for the Eastern District of Louisiana and appellant in the United States Court of Appeals for the Fifth Circuit, pray that a writ of certiorari

issue to review the judgment of the United States Court of Appeals for the Fifth Circuit rendered on March 27, 1987, the Court having denied a Petition for Rehearing and Petition for Rehearing En Banc on April 27, 1987.

OPINIONS BELOW

The Judgment of the United States District Court for the Eastern District of Louisiana in the matter captioned, "Gloria Hill, wife of/and Thomas J. Clanton, Plaintiffs, versus The Chilean Line, Vessel S. S. RENAICO and Compania Sud-Americana De Vapores, Defendants," bearing No. 83-432 dated and entered on August 8, 1985. (Appendix, p. A-1, "A") and Transcript of Ruling. (Appendix, p. A-2, "B")

The Opinion of the United States Court of Appeals for the Fifth Circuit captioned, "Gloria Hill, wife of/and Thomas J. Clanton, Plaintiffs-Appellants, versus The Chilean Line, et al, Defendants, Vessel S. S. RENAICO and Compania Sud-Americana de Vapores, Defendants-

Appellees," bearing No. 85-3566 dated March 27, 1987. (Appendix, p. A-11, "C")

The denial of Petition for Rehearing and Suggestion for Rehearing En Banc denied on April 27, 1987. (Appendix, p. A-15, "D")

JURISDICTION

The judgment of the District Court in this matter was dated and entered on August 8, 1985.

The Petition for Rehearing and Rehearing En Banc were denied on April 27, 1987.

Jurisdiction of this Court is invoked under Title 28, U.S.C. 1332, based upon diversity of citizenship and jurisdictional amount.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VII - Civil Trials

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

This case emanates from an original Complaint filed by petitioners in the United States District Court for the Eastern District of Louisiana. (Appendix, p. A-16, "E") The Complaint was filed on January 28, 1983 and alleges jurisdiction, "based upon the general maritime law and all statutes and laws of the United States pertinent thereto," and jurisdictional amount in excess of $10,000.00 per complainant. The Complaint further prays for a trial by jury. In the respondent's Answer and Special Defenses, there is no specific objection to petitioners' jury demand. (Appendix, p. A-20, "F")

On November 27, 1984 a Minute Entry was filed setting out the proceedings of a preliminary pre-trial conference. (Appendix, p. A-23, "G") In this Minute Entry it stated that, "Trial will commence on May 23, 1985 at 8:30 A. M. before the District Judge with a jury." The

Minute Entry is signed by Jacob J. Meyer, United States Magistrate.

On May 29, 1985 a Minute Entry was filed granting the motion of plaintiffs (petitioners) to continue the trial of the case. (Appendix, p. A-25, "H") This Minute Entry stated that, "The trial is expected to last three days with a jury."

Finally, the Pre-Trial Order was filed in this matter on July 23, 1985 in preparation for the August 5, 1985 trial date. (Appendix, p. A-26, "I") In the Pre-Trial Order it is stated in Paragraph 15 therein that:

> "This is a jury case. A jury is applicable to all aspects of this case. Proposed jury instructions and any special questions that the Court is asked to put to prospective jurors on voir dire shall be delivered to the Court and opposing counsel not later than one week prior to the trial date, unless specific leave to the contrary is granted by the Court."

In fact, nowhere in the docket sheet of this matter is there shown any mention of any objection by defendants or questioning by the District Judge of petitioners' right to a jury trial. (Appendix, p. A-41, "J") However, as this Honorable Court may glean from a review of this docket sheet, the trial did proceed without a jury.

On the eve of the trial of this matter, August 4, 1985, the District Judge placed a conference call to attorneys for petitioners and respondents. In this conference call the District Judge stated that he had reviewed the pleadings in the matter and that he was convinced that there was no right to a jury trial in the matter. Although counsel for petitioners objected to this, the District Judge stated that he was striking the jury in the matter.

It is also important to note that the Pre-Trial Order filed on July 23, 1985 further clarified the jurisdictional bases for this action by stating in Paragraph 4 of the document that, "Jurisdiction in this matter is based upon the General Maritime Law, as well as diversity of citizenship and jurisdictional amount. Jurisdiction is uncontested."

The District Judge, sitting without a jury, found no liability on the part of respondents and granted an involuntary dismissal. The District Court then entered Judgment in favor of defendants (respondents) and

dismissed the action. This Judgment was entered and filed on August 8, 1985.

The Untied States Court of Appeals for the Fifth Circuit affirmed the District Court judgment and denied a Petition for Rehearing and Petition for Rehearing En Banc. It is from this denial by the Court of Appeals for the Fifth Circuit that we now submit to this Honorable Court that petitioners were denied their Seventh Amendment righ to a trial by jury. We ask that this Honorable Court grant relief by the issuance of writs of certiorari directed to the United States Court of Appeals for the Fifth Circuit.

ARGUMENT

It was error for the District Court to strike the petitioners' jury on the eve of the trial in this matter. Petitioners invoked the diversity jurisdiction of the District Court and did not make a designation t proceed in admiralty pursuant to Rule 9 (h) of the Federal Rules of Civil Procedure. There was no objection by defendant to petitioners' right to jury trial and no questioning of that right by the District Court until the eve of the trial.

In petitioners' original Complaint, jurisdiction was, "based upon the general maritime law and all statutes and laws of the United States pertinent thereto" as well as jurisdictional amount in excess of $10,000.00 per complainant. This allegation of jurisdiction would by implication include the jurisdictional basis of diversity of citizenship since such is conferred by the "statutes and laws of the Untied States." Furthermore, in the Pre-Trial Order filed on July 23, 1985 the statement of jurisdictional bases ic clariried in Paragraph 4 to state that, "Jurisdiction in this matter is based upon the General Maritime Law, as well as diversity of citizenship and jurisdictional amount. Jurisdiction is uncontested."

The petitioners also properly demanded the jury trial in their original Complaint. The action by the District Court in striking the jury on the eve of trial was a violation of petitioners' Seventh Amendment right to trial by jury. Although counsel for petitioners objected to the striking of the jury, no record was made of such since it was Sunday afternoon on the eve of trial and counsel for petitioners received the telephone call at his home.

In the landmark case of *Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.,* 369 U.S. 355, 360 82 S.Ct. 780, 783-781, 7 L.Ed.2d 798 (1962), this Court cited Gilmore and Black, *The Law of Admiralty* (1957), for the proposition that where a suit with a maritime nexus, "'is *in personam,* it may be brought either in admiralty or under the saving clause, in an appropriate non-maritime court, by ordinary civil action.' And such suits on the law side are not restricted to enforcement of common law rights but extend as well to maritime torts." (Citations omitted)

This Court went on further to state that, "This suit being in the federal courts by reason of diversity of citizenship carried with it, of course, the right to trial by jury." It is urged that the instant case is nothing more than an *in personam* diversity action and since diversity and jurisdictional amount exist there should be the right to trial by jury guaranteed by the Seventh Amendment of the United States Constitution. See Also, *Powell v. Offshore Navigation Corporation,* 644 F.2d 1063 (5th Cir. 1981).

The issue, however, arises in light of Rule 9 (h) of the Federal Rules of Civil Procedure which states in pertinent part that:

> "A pleading or court setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14 (c), 38 (e), 82 and the Supplemental Rules for Certain Admiralty and Maritime Claims."

The District Court struck the petitioners' jury when it decided that the allegations of jurisdiction in petitioners' Complaint and the Pre-Trial Order filed with the District Court constituted a designation under Rule (h) of the Federal Rules of Civil Procedure. The District Court believed that these allegations were sufficient to take away petitioners' right to a trial by jury guaranteed by the Seventh Amendment of the United States Constitution and Rule 38 of the Federal Rules of Civil Procedure which states that; "The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate."

Petitioners submit that their allegations of jurisdiction did not constitute a designation of this case as an admiralty or maritime claim so as to take away their right to trial by jury. In the alternative it is urged that if the allegation by petitioners in their complaint did constitute a designation pursuant to Rule 9 (h) of the Federal Rules of Civil Procedure, then the cases which state what a designation pursuant to Rule 9 (h) shall consist of have either been misinterpreted by the District Court and the Fifth Circuit Court of Appeal, or these cases lead to a hypertechnical interpretation of Rule 9 (h) and should be overuled.

The language in the allegation of jurisdiction that the District Court beieved constituted a Rule 9 (h) designation is the mention of the General Maritime Law as a basis for jurisdiction in petitioners' original Complaint and the Pre-Trial Order filed on July 23, 1985. The Fifth Circuit Court of Appeals had determined what constitutes a Rule 9 (h) designation in a number of cases. In *Romero v. Bethlehem Steel Corporation,* 515 F.2d 1249 (5th Cir. 1975), the plaintiff made an express reference to the action

being brought under Rule 9 (h) of the Federal Rules of Civil Procedure. The complaint in that case specifically alleged that:

> "Complainant alleges a cause of action based upon negligence in accord with general maritime law and a second cause of action on the grounds of unseaworthiness in accord with general maritime law and a second cause of action on the grounds of unseaworthiness in accord with Rule 9 (h) of the Federal Rules of Civil Procedure."

In *Romero, supra*, the plaintiff then tried to add diversity as an independent basis of jurisdiction in the Pre-Trial Order, over defendant's objection. That case is clearly distinguishable from the instant one in that the plaintiff in *Romero, supra,* expressly invoked Rule 9 (h) of the Federal Rules of Civil Procedure, while petitioners in the case at bar did not. The case at bar is further distinguishable in that the defendant in *Romero, supra*, objected to plaintiff's right to trial by jury in the Pre-Trial Order. In the instant case, the defendant did not object to petitioners' right to trial by jury, nor did the District Judge question petitioners' right to a trial by jury. The parties and District Judge all signed the Pre-Trial Order filed on July 23, 1985 which designated this matter to be a trial with a jury and with a

jury applicable to all aspects of the case. (Appendix, p. A-29, "I")

In *T.N.T. Marine Service v. Weaver Shipyards,* 702 F.2d 585 (5th Cir. 1983), the United States Court of Appeals for the Fifth Circuit interpreted the holding in Romero, supra, and found that:

> "Although the complaint alleged diversity jurisdiction, it went on to state: 'This is also a suit for breach of a maritime contract and for maritime tort.' While the preferable technique might be to expressly invoke Rule 9 (h) (*see* Wright and Miller, *supra,* at 454; Fed.R.Civ.P. Forms 2 (d), 15), this quoted language from the complaint is a simple statement asserting admiralty or maritime claims under the first sentence of Rule 9 (h), as is the opening line of the complaint: 'The Complaint of T.N.T. Marine Service, Inc....against Weaver Shipyards & Dry Docks, Inc....for breach of contract, civil and maritime, and for maritime tort avers on information and belief as follows....'"

It is submitted that the language in the complaint of plaintiff in the above cited case is a clear designation of intent to proceed in admiralty pursuant to Rule 9 (h) of the Federal Rules of Civil Procedure. On the other hand, in the instant case the allegation that "jurisdiction is based on the general maritime law" should not act to take this action

away from the jury in light of the invocation of diversity jurisdiction by petitioners. Furthermore, in *T.N.T., supra,* the complaint stated claims *in rem* against the vessel involved. The case at bar is distinguishable in that it is a purely *in personam* action in which all claims may be tried to a jury.

In *Gilmore v. Waterman Steamship Corporation,* 790 F.2d 1244 (5th Cir. 1986), the United States Court of Appeal for the Fifth Circuit expressly followed *T.N.T., supra,* and stated that the jurisdictional allegations of plaintiff, Gilmore, were indistinguishable from those of the plaintiff in *T.N.T., supra.* The Fifth circuit held that the district court correctly characterized the action as an admiralty case in which the plaintiff had no right to a jury trial. Once again, it is urged that the jurisdictional allegations in the instant case concerning admiralty did not rise to the level of the *T.N.T., supra,* and *Gilmore, supra,* cases. Thus, there was no Rule 9 (h) designation and petitioners retained their right to trial by jury.

It is submitted that the District Court and Fifth Circuit Court of Appeals erred in their interpretation of

these three above cited Fifth Circuit cases and gave them an overbroad interpretation to contro the jury issue in this matter. If, however, this Honorable Court finds that the Courts below rendered a correct sinterpretation of these cases in denying the right of petitioners to trial by jury, then it is urged that the above line of cases has evolved into a hypertechnical trap for the unwary pleader. The above cited line of cases should thus be overruled to the extent they allow any mention of the word "maritime" to take away petitioners' Seventh Amendment right to trial by jury.

CONCLUSION

It is submitted that the striking of the petitioners' jury on the eve of trial based on an allegation that they had made a Rule 9(h) designation was a violation of the petitioners' Seventh Amendment right to trial by jury. The petitioners properly invoked the diversity jurisdiction of the District Court and did not make the type of allegations in their Complaint or the Pre-Trial Order which should constitute an intention to proceed on the admiralty side of

the Court. The petitioners properly demanded a jury, there was no objection be defendants to this jury request, nor was there any questioning of petitioners' right to a trial by jury until the eve of the trial. All of the parties and the District Judge signed a Pre-Trial Order which stated that this was to be a jury trial.

It is urged that the findings of the Courts below demonstrate a misinterpretation of the *Romero, supra; T.N.T., supra;* and *Gilmore, supra,* line of cases. In the event that the Courts below correctly interpretated the above cited line of cases, it is alternatively argued that these cases should be reexamined as constituting an overbroad interpretation of the scope of Rule 9 (h) of the Federal Rules of Civil Procedure and that which constitutes an election to proceed in admiralty under that rule.

Accordingly, petitioners respectfully ask that this Honorable Court issue writs of certiorari directed to the

United States Court of Appeals for the Fifth Circuit regarding this matter.

Respectfully submitted,

DARRYL J. TSCHIRN

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing Brief this the 24th day of July, 1987 by placing it in the United States Postal Service postage prepaid to:

William E. Wright, Esq.
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DARRYL J. TSCHIRN

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed
U.S. District Court
Aug. 8, 1985
12:50 p.m.
Loretta G. Whyte

GLORIA HILL, ET AL	CIVIL ACTION
VS.	NO. 83-432
THE CHILEAN LINE, ET AL	SECTION "G"

JUDGMENT

The Court having on August 7, 1985, granted the defendants motion for an involuntary dismissal;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants, Compania Sud-Americana De Vapores and Vessel S. S. Renaico, and against plaintiffs, Gloria Hill, wife of and Thomas J. Clanton, dismissing plaintiffs' suit at their costs.

IT IS FURTHER ORDERED that the intervention of Employers National Insurance Company is dismissed as moot.

Dated at New Orleans, Louisiana, this 8th day of August, 1985.

_____
LORETTA G. WHYTE, CLERK

APPROVED AS TO FORM:

_____
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS

Filed
U.S.District Court
Eastern District
Date Illegible
Loretta G. Whyte,
Clerk

THOMAS CLANTON

DOCKET NO.: 83-432
NEW ORLEANS, LOUISIANA
AUGUST 7, 1985

VERSUS

THE CHILEAN LINE, ET AL

****

VOLUME III

TRANSCRIPT OF RULING
BEFORE THE HONORABLE MOREY L. SEAR

****

APPEARANCES:

FOR THE PLAINTIFF: DARRYL J. TSCHIRN, ESQ.

FOR THE DEFENDANTS:

COURT REPORTER: PATRICIA F. DURONCELET
11679 PRESSBURG STREET
NEW ORLEANS, LA 70128

THE COURT: This is an action brought under the Longshoreman and Harbour Workers Compensation Act for damages that were sustained by the plaintiff, Thomas J. Clanton, as a result of injuries he sustained on June 23, 1982 while working as a longshoreman in the employ of J. Youngman and Company, a stevedore, on June 23, 1982. Mr. Clanton's longshore gang was assigned to and was working the hole of the SS RANAKCO, a vessel that was operated by the Chilien Line and the defendants in this action. The vessel was on it's southbound journey and was calling at the port of New Orleans with cargo prior to sailing for the port of Houston.

The plaintiff was injured when fire bricks, which he and his crew had loaded into the hole of the RANAKCO, fell on him causing serious injuries from which he still suffers. Plaintiff's injuries occurred after the longshore crew had stacked corrugated cartons of fire brick in the hole and commenced working on cargo drums in the same hole.

According to the testimony of plaintiff's witnesses and plaintiff, the fire bricks were stowed on pallets in the lower hole of the vessel along the port bulkhead of the area

assigned for loading that cargo by the vessel. Testimony of plaintiff's witnesses was that without warning there was a sudden list and cartons of bricks weighing approximately 35 hundred pounds each became dislodged from the port bulkhead or from the stacks against the port bulkhead and fell to the starboard side on top of plaintiff, causing his injury.

The testimony of plaintiff's witnesses was that the list of the vessel was so great and so sudden that the bricks that they had stowed fell on the plaintiff. Indeed the plaintiff's witnesses testified and drew diagrams to illustrate the angle of list that exceeded an angle of 45 degrees.

Further, one of the plaintiff's witnesses testified that the list and that angle of list remained for a period of -- though it was not clear to me, from the testimony, whether it was a half an hour to an hour and a half or an hour to an hour and a half, but in any event, for a period of time of at least a half an hour and that angle of list was as marked, as I have already said.

Opposed to that testimony was the testimony of the ship's captain, the chief officer, and the third officer of the RANAKCO, who were all abord the vessel at the time of the accident. Parties have stipulated that at the time of the accident. Parties have stipulated that at the time of the accident containers were not being loaded aboard the vessel and I find as a fact that they were not. The ship's captain testified that he had not noticed any abnormal list of the vessel and he considered an abnormal list to be one of greater than six degrees. Neither the chief officer nor the third officer experienced or felt any list of the vessel.

A fourth experienced mariner, the port captain, arrived on the scene of the accident approximately ten minutes after it occurred and within the time that Willie Mack, I believe, testified that the vessel maintained itself in the listed position, found no list of any notice. Testimony of the captain was that the configuration of the cargo at that time on the day of the accident was such that the picking up of a weight of 20 tons with the ship's tackle would cause the vessel to list no more than four or five degrees and both he and the port captain testified that any list of the vessel

would not be a sudden surge, but would be a very gradual and slow kind of movement.

I find based upon the testimony of the witnesses, that the vessel did not in fact list beyound any normal expectation. That there did not exist the sudden list to which plaintiff's witnesses testified. That a list was noticed by the captain, by his officers, by the port captain and despite the lengthy period which plaintiff's witnesses claimed the list to have existed, none was reported to the captain or any member of the crew. I also find as a matter of fact that any list of the vessel was normal and that there was no sudden list.

The plaintiff advances the theory that the vessel was properly stowed by the longshore men, that the stability of the vessel is determined by the stow of its cargo, the trim of its tanks, including fuel, water and ballast, that because the port captain testified that he saw nothing wrong that the longshoremen had done, and because the trim of the vessel was within the sole control of the defendant, the doctrine of res ipsa loquitur applies. Res ipsa loquitur, however, applies only where the thing

that caused the accident is under the exclusive control of the defendant. In this case, the plaintiff contends that he was injured when the ship listed, causing one or more of the pallets of fire brick to fall on him. So the doctrine of res ipsa loquitur may be applied only if the pallets were properly stored such that they would not fall absent an abnormal, unexpected list of the vessel and because the vessel listing was within the exclusive control of the defendant.

Well, certainly, the witness, the port captain, upon whom plaintiff relied, did indeed testify that he saw nothing that the longshoremen did wrong, but then, of course, he didn't view the scene until after the bricks had fallen and could not possibly testify as to the manner in which they were in fact stowed prior to having fallen. Moreover, the stowage of that cargo was under the control of the plaintiff and his co-workers who had been hired because of their expertise, to stow the cargo of the vessel in those areas of the hole assigned for the stow of that cargo by the master of the vessel through his first officer.

I find that there was no negligence in the care that the vessel took in maintaining its seaworthiness and stability during the loading operation. The plaintiff's witnesses have testified that the bricks were loaded by them along the port side of the vessel, that the vessel listed to starboard and the bricks came tumbling down.

Defendants have introduced into evidence the cargo stowage plan of the RANAKCO and the first officer has testified as to the stowage of the cargo of bricks in the hole of the vessel. Moreover, he has testified and testified at length in response to questions by both plaintiff and defendant, calling for his expertise as a mariner, as to the proper method of stowage of cargo.

I find that proper stowage of the cargo in the area assigned would have been from bulkhead to bulkhead, creating a solid block of cargo. So that if the vessel listed or rolled at sea, the weight of the cargo would be applied against the cargo itself and the ulkheads of the vessel and would not be displaced. If the cargo was loaded in any other way it was improperly loaded by the longshoremen.

So that there can be no mistake as to my findings with regard to res ipsa loquitur, I would like to go back and review that which I have said.

Even assuming that the vessel did list, and I have found that it did not, plaintiff has not presented any evidence of negligence on the part of the vessel or the vessel's owner that caused the vessel to list. Instead, it seeks to rely -- to hold the defendant liable under the doctrine of res ipsa loquitur. I have said that the doctrine applies only where the thing that caused the accident was under the exclusive control of the defendant. In this case, the plaintiff contends that he was injured when the ship listed, causing one or more pallets of fire brick to fall on him and that the doctrine applies only if the pallets were properly stowed such that they would not fall absent an abnormal, unexpected list of the vessel. And second, the cause of the vessel listing was within the exclusive control of the defendant. And I have outlined the evidence upon which plaintiff relied. That of the port captain of the defense, including the mooring of the ship, the trim of the tanks, including the ballast, the fuel and the water, the

stowage of cargo. Only one of those factors, the stowage of cargo, was not within the exclusive control of the defendant. The proper stowage of cargo was within the joint control of the stevedores and the vessel; the vessel instructs the stevedore where to put the cargo and the stevedore stows that cargo in that location.

The parties have agreed that no containers were being loaded at the time of the accident and the plaintiff would infer from these facts that the stevedore didn't cause the vessel to list. But the captain testified that a 20 ton load would cause the vessel to list only four or five degrees. If the vessel listed, as I am assuming here, some relatively large load lifted by one of the cranes, operated by a longshoreman, would have caused the vessel to list. The cargo list for the vessel shows there was one heavy lift that loaded in New Orleans. The plaintiff offered no evidence to show that the lifting of that nine ton load by the Stevedores didn't cause the list.

Subsequently, even assuming that the vessel did list, plaintiff has failed to prove that all potential causes, including the improper stowage of brick along the port

bulkhead, were not all potential causes of the listing, which were within the exclusive control and res ipsa loquitur may not be applied.

Accordingly, I find that vessel did not list and the plaintiff failed to carry his burden in proving that the defendant was neglect whether by direct evidence of the doctrine res ipsa loquitur, accordingly, the motion of defendants for involuntary dismissal is granted. In the event there is an appeal taken I shall file and request written reasons.

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

s/Signature Illegible

11/25/85

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-3566
Summary Calendar

GLORIA HILL, wife of and
THOMAS J. CLANTON,

Plaintiffs-Appellants,

versus

THE CHILEAN LINE, ET AL.,

Defendants,

VESSEL S. S. RENAICO and COMPANIA
SUD-AMERICANA DE VAPORES,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA-83-432-G-(3)

(March 27, 1987)

Before REAVLEY, JOHNSON and DAVIS, Circuit Judges.
DAVIS, Circuit Judge: *

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide

particular cases on the basis of well-settled principles of law imposes needless expense on the public and burden on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Thomas Clanton and his wife sued the S. S. RENAICO and its owner, Compania Sud-Americana de Vapores (Chilean Line) to recover damages for injuries he suffered while loading cargo on the S. S. RENAICO. The district court, after a bench trial, entered judgment for the defendants and dismissed Clanton's suit. We find no error and affirm.

I.

Clanton was injured while employed as a longshoreman loading pallets of fire bricks and drums of chemicals onto the S. S. RENAICO. After he finished loading the fire bricks and while he was loading the drums of chemicals, a four tier high stack of fire brick pallets fell and struck Clanton.

The district court on the day before trial ruled that the case would proceed without a jury because Clanton's petition states that jurisdiction is based on "general

maritime law." Accodingly, the case was tried without a jury.

Clanton contended that the vessel owner was negligent in permitting the S.S. RENAICO to list without warning and that the sudden list caused the fire bricks to fall. The district court found that the RENAICO did not list. The court also found that it was more probable than not that the cargo was improperly stowed by the longshoremen. Predicated on these factual findings, the court granted judgment for defendants and Clanton's claims were dismissed.

On appeal, Clanton claims that the district court erred in (1) striking the jury and (2) finding that the S.S. RENAICO and Chilean Line was not at fault.

II.

Clanton first contends that the district court erred by striking the jury and proceeding with a bench trial. In his complaint, Clanton stated that jurisdiction is based on "the general maritime law."

In *T. N. T. Marine Service v. Weaver Shipyards & Drydocks*, 702 F.2d 585, 587 (5th Cir.), *cert. denied*, 464 U.

S. 847 (1983), this court held that "there is no right to a jury trial where the complaint contains a statement identifying the claim as an admiralty or maritime claim even though diversity jurisdiction exists as well." See also *Durden v. Exxon Corp.*, 803 F.2d 845, 849-50 (5th Cir. 1986). Because Clanton's complaint states that "[t]he jurisdiction of this court is based upon the general maritime law," Clanton was not entitled to a jury trial.

Clanton also argues that the district court's finding that the S.S. RENAICO and the Chilean Line are not liable is clearly erroneous. Clanton's theory of liability is that the pallet of bricks fell on him because the defendant negligently allowed the vessel to list.

Captain Orlandi, third officer Perez and the vessel's chief officer Jorge Cerdo testified that they were aboard the S.S. RENAICO at all times on the day of the accident and that the vessel did not list. Although plaintiff's witnesses testified that the vessel did list and that the cargo was properly stowed, the district court was entitled to accept the testimony of the ship's officers over that of Clanton's

witnesses. Thus, the district court's finding that the vessel did not list is not clearly erroneousl.

AFFIRMED.

IN THE UNITED STATES
COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Filed
U.S. Court of Appeals
April 27, 1987
Gilbert F. Ganucheau,
Clerk

No. 85-3566

GLORIA HILL, Wife of and

THOMAS J. CLANTON,

Plaintiffs-Appellants,

versus

THE CHILEAN LINE, ET AL.,

Defendants,

VESSEL S. S. RENAICO

COMPANIA SUD-AMERICANA DE VAPORES,

Defendants-Appellees.

Appeal from the United States District Court for the
Eastern District of Louisiana

ON PETITION FOR REHEARING AND SUGGESTIONS

FOR REHEARING EN BANC

A-19

(Opinion MARCH 27, 1987, 5 Cir., 198 __,

_____F.2d_____)

(April 27, 1987)

Before REAVLEY, JOHNSON and DAVIS, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requeested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en

banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

s/Signature Illegible

United States Circuit Judge

UNITED STATES DISTRICT COURT Filed

STATE OF LOUISIANA Date Illegible

EASTERN DISTRICT

GLORIA HILL, wife of and
THOMAS J. CLANTON CIVIL ACTION 83-432

VERSUS NO.

THE CHILEAN LINE and the
VESSEL S. S. RENAICO SECT. G. MAG. 3

COMPLAINT

The joint Complaint of Gloria Hill, wife of Thomas J. Clanton, both persons of the full age of majority and residents of the State of Louisiana, respectfully represents:

I.

The jurisdiction of this Court is based upon the general maritime law and all statutes and laws of the United States pertinent thereto and the damages herein exceed $10,000.00 per complainant.

II.

The defendant, The Chilean Line, is a corporation doing business in this district and as such, is subject to the jurisdiction of this Honorable Court and at all times

pertinent herto, was the owner of the vessel S. S. RENAICO and both defendants are liable jointly, severally and in solido unto complainants for the following:

On or about June 23, 1982, while employed by J. Young & Company as a longshoreman, Thomas Clanton was working aboard the vessel S. S. RENAICO, which vessel was docked at the Port of New Orleans.

IV.

While so employed, and while working storing bricks in the hold of the S.S. RENAICO, the ship listed suddenly causing some previously stacked bricks to fall on Thomas J. Clanton.

V.

As a result of this accident, the complainant, Thomas J. Clanton, suffered serious injuries consisting primarily of a fractured pelvis and left leg. As a result of these injuries, the complainant, Thomas J. Clanton, will be left with a permanent disability of a serious nature.

VI.

That at all times pertinent hereto, complainant, Gloria Hill Clanton, was the wife of the complainant, Thomas J. Clanton.

VII.

As a proximate result of the negligence of the defendants which resulted in injuries to Thomas J. Clanton on June 23, 1982, the complainant, Gloria Hill Clanton, was caused to sustain a loss of her husband's society which includes, but not exclusively, love, affection, care, attention, companionship, comfort and protection all to her damage in the amount of TWO HUNDRED FIFTY THOUSAND AND NO/100 ($250,000.00) DOLLARS.

VIII.

The proximate cause of the accident and/or injuries alleged was the negligence of the defendants, The Chilean Line and vessel S.S. RENAICO as well as their agents, servants, employees, as their responsiblity may appear as will be shown at the time of the trial.

IX.

As a result of the acts of negligence of the defendants, the complainant, Thomas J. Clanton, was

rendered sick, sore, lame and disabled and is still disabled and will be rpevented or hindered from pursuing an occupation all to his damage in the amount of ONE MILLION AND NO/100 ($1,000,000.00) DOLLARS, together with a right to compensation for loss or diminution of earnings, costs, interest and all of the damages that will be shown at the time of trial.

X.

Complainants are entitled to and pray for a trial by jury.

WHEREFORE, Gloria Hill Clanton and Thomas J. Clanton pray that citation and service of process issue herein and further pray for judgment herein against the defendants, The Chilean Line and the vessel S.S. RENAICO, jointly, severally, and in solido in the full and true sum of ONE MILLION TWO HUNDRED FIFTY THOUSAND AND NO/100 ($1,250,000.00) DOLLARS, together with a further award for diminution of wages, costs, interest, and all damages which will be shown at the

trial. Complainants further pray for a trial by jury.

RESPECTFULLY SUBMITTED:

DONALD M. PIERCE-GERTLER & GERTLER
1001 Howard Avenue - Suite 4400
New Orleans, Louisiana 70113
Telephone: 504-581-6411
ATTORNEY FOR COMPLAINANTS

PLEASE SERVE:
The Chilean Line and
the S. S. RENAICO
thru their agent for
Service of Process:

KERR STEAMSHIP CO., INC.
Suite 5130
One Shell Square
New Orleans, LA 70139

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

GLORIA HILL, wife of and THOMAS J. CLANTON

CIVIL ACTION

NO. 83-432

vs.

SECTION "G" (3)

THE CHILEAN LINE and the Vessel S.S. RENAICO

ANSWER AND SPECIAL DEFENSES

COMES NOW defendant, Compania Sud-Americana de Vapores (CSAV), and answers the Complaint, with the following special defenses, as follows:

1. The defendant, Compania Sud-Americana de Vapores (CSAV), admits that it is a foreign corporation authorized to do business and doing business in the State of Louisiana and that the Court has jurisdiction of this case; but defendant, Compania Sud-Americana de Vapores (CSAV), denies, all and singular, the remaining allegations of the Complaint.

2. Further answering the Complaint, the defendant, except as otherwise stated above, denies, all and singular, all of the remaining allegations of the Complaint and sets up the following affirmative defenses.

3. Defendant denies that plaintiff was injured and that it was in any way negligent.

4. Defendant alleges that the proximate cause of any accident or injury sustained by plaintiff was plaintiff's own carelessness, inattention to duty, and fault, and alternatively, defendant pleads assumption of the risk and contributory negligence.

5. Defendant reserves the right to amend this Answer after discovery has been completed.

WHEREFORE, defendant, Compania Sud-Americana de Vapores (CSAV), prays that after due proceedings had there be judgment in its favor dismissing the Complaint with costs and granting all further relief in the premises as in law or in justice defendant may be entitled to receive.

TERRIBERRY, CARROLL, YANCEY & FARRELL

William E. Wright
2100 International Trade Mart
New Orleans, LA 70130
504-523-6451
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail, postage prepaid and properly addressed, to Donald M. Pierce, Esquire, Gertler & Gertler, Suite 4400, 1001 Howard Avenue, New Orleans, LA 70113, this _____ day of _____, 1983.

_____
William E. Wright

MINUTE ENTRY
MEYER, M.
NOVEMBER 20, 1984

Filed U.S. District Court
Eastern District of La.
Nov. 27, 1984
Loretta G. Whyte, Clerk

GLORIA HILL, wife of/and
THOMAS J. CLANTON — CIVIL ACTION

VERSUS — NUMBER: 83-432

THE CHILEAN LINE, ET AL. — SECTION "G" (3)

A preliminary pre-trial conference was held this date.

PRESENT: RICHARD L. GREENLAND, ESQ., for plaintiff; GARY HEMPHILL, ESQ., for defendant; and DOUGLAS P. MATTHEWS, ESQ., for intervenor.

Pleadings have been completed. Jurisdiction has been established.

All pre-trial motions shall be filed and served in sufficient time to permit hearing thereon no later than 30 days prior to trial date.

Depositions for trial use shall be taken and all discovery shall be completed not later than 30 days prior to pre-trial conference date.

Amendments to pleadings, third-party actions, cross-claims and counterclaims shall be filed no later than April 5, 1985.

Pleadings responsive thereto, when required, shall be filed within the applicable delays therefor.

Written reports of experts who may be witnesses shall be obtained and exchanged by the parties not later than 60 days prior to pre-trial conference date.

Counsel for the parties shall file in the record and serve upon their opponents a list of all witnesses who may or will be called to testify on trial not later than 60 days prior to pre-trial conference date.

Settlement possibilities were discussed. A further settlement conference will be scheduled before the Magistrate upon request of counsel.

This case does not involve extensive documentary evidence.

A final pre-trial conference will be held before the District Judge on May 10, 1985 at 9:00 A.M. Counsel will be prepared in accordance with the final pretrial notice attached.

Trial will commence on May 23, 1985 at 8:30 A.M. before the District Judge with a jury. Attorneys are instructed to report for trial not later than 30 minutes prior to this time. The starting time on the first day of a jury trial may be delayed or moved up one hour because of jury pooling. Trial is estimated to last two day(s).

Deadline or cut-off dates fixed herein may only be extended by the Court upon timely applicabion and upon a showing of good cause.

_____

JACOB J. MEYER
UNITED STATES MAGISTRATE

MINUTE ENTRY
SEAR, J.
MAY 28, 1985

Filed: Date Illegible
Clerk Name Illegible

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

GLORIA HILL, ET AL.	CIVIL ACTION
VERSUS	NO. 83-432
THE CHILEAN LINE, ET AL.	SECTION "G"

The Court having granted the motion of plaintiff to continue the trial of this case,

IT IS ORDERED that the trial of this matter is continued until Monday, August 5, 1985 at 8:30 a.m. The trial is expected to last three days with a jury. A final pre-trial conference will be held on Monday, July 22, 1985 at 9:40 a.m. All discovery shall be completed not later than 30 days prior to pre-trial, and written reports of experts who may be witnesses shall be obtained and exchanged by the parties not later than 60 days prior to pre-trial.

MOREY L. SEAR
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed:
July 23, 1985
Clerk Name:
Illegible

GLORIA HILL, Wife of/and
THOMAS J. CLANTON,
Plaintiffs

CIVIL ACTION

versus

NO. 83-432

THE CHILEAN LINE, ET AL.,
Defendants.

SECTION "G" (3)

PRE-TRIAL ORDER

1.

A Pre-Trial Conference was held in this matter on July 23, 1985 at 9:30 a.m. before the Honorable Morey L. Sear in Chambers.

2.

The following counsel appeared:

a) For the Plaintiffs, Gloria Hill, wife of/and Thomas J. Clanton

DARRYL J. TSCHIRN, ESQ.
3850 N. Causeway Blvd.
Suite 1290
Metairie, LA 70002
Telephone: (504) 837-0706

JOHN M. ROBIN, ESQ.
Bogue Falaya Plaza
P. O. Box 1839
Covington, LA 70434

Telephone: (504) 837-7300

b) For the Defendant, Compania Sud-Americana de Vapores	WILLIAM E.WRIGHT,ESQ. GARY A. HEMPHILL, ESQ. Terriberry, Carroll & Yancey 2100 ITM Building New Orleans, LA 70130 Telephone: (504) 523-6451
c) For the Intervenor, Employers National Insurance Co.	DOUGLAS P.MATTHEWS,ESQ. Lemle,Kelleher, Kohlmeyer, Hunley, Moss & Frilot 2100 Pan-American Life Center New Orleans, LA 70130 Telephone: (504) 586-1241

3.

Description of parties:

a) Plaintiffs:

Plaintiffs, Gloria Hill, wife of/and Thomas J. Clanton have filed suit for personal injuries of Mr. Clanton under the General Maritime Law and on behalf of Gloria Hill Clanton for loss of society.

b) Defendant, Compania Sud-Americana de Vapores:

Defendant owned the SS RENAICO.

c) Intervenor, Employers National Insurance Company:

At the time of the accident in suit, intervenor provided compensation insurance issued to J. Young & Co. under the Longshoremen's and Harbor Workers' Compensation Act against liability under the aforesaid Act for any injury to the stevedoring company's employees occurring in the course and scope of their employment.

4.

Jurisdiction:

Jurisdiction in this matter is based upon the General Maritime Law, as well as diversity of citizenship and jurisdictional amount. Jurisdiction is uncontested.

5.

Motions pending or contemplated:

Plaintiffs, Gloria Hill, Wife of/and Thomas J. Clanton, have filed a Motion to Take the Video Deposition of Dr. J. Monroe Laborde for use at trial; plaintiffs have also filed a Motion to Allow Plaintiff to Amend Witness List, which motion was requested to be heard at the Pre-Trial Conference in this matter.

6.

Material facts as claimed by:

a) Plaintiffs:

Plaintiffs contend that on or about June 23, 1982, while working in the course and scope of his employment, Thomas J. Clanton was cuased to be seriously and permanently injured when, while storing cargo in the hold of the vessel, the SS RENAICO, the said vessel listed suddenly causing 2 pallets of bricks, weighing approximately 3,000 pounds, to fall on the plaintiff, Thomas J. Clanton.

Plaintiff contends his injuries were caused by the negligence of the defendant vessel owner in failing to use proper care in controlling the listing of said vessel. Additionally, plaintiffs plead the doctrine of res ipsa loquitur.

> Defendant, Compania Sud-Americana de Vapores, objects to any changes in the Pre-Trial Order from the original Pre-Trial Order, including changes in phraseology of how the accident happened.

b) Defendant, Compania Sud-Americana de Vapores:

The defendant says plaintiff was employed as a longshoreman by J. Young & Co., Inc., a stevedore, and that plaintiff's employer was an independent contractor who was completely in charge of the work plaintiff was performing and was responsible for all of the loading operations aboard the vessel. The defendant further says that, as an independent contracting stevedore, Young supplied the superintendents, foremen, and longshoremen, including the plaintiff, to perform the loading and that the employees of Young were responsible properly and safely to load cargo, including the cargo that was being loaded by plaintiff.

The defendant further says that the vessel's officers and seamen were not involved in the loading and had obsolutely no duty to supervise the loading of the cargo. Furthermore, during the course of the loading, no one employed by Young made any complaint to the vessel's officers and crew about the work or at any time stated or suggested there was anything wrong with the vessel or that the vessel in any caused or contributed to the accident. With respect to plaintiff's contention that the ship listed,

and that a list caused or contributed to the accident, defendant says that there was no list, that no list caused or contributed to the accident, and that, in any event, the loading of the vessel by Young would have caused any list and, therefore, if there was a list, which defendant denies existed or caused or contributed to the accident, the list was caused by Young and its employees, including plaintiff, and was a condition and not a cause of the accident, but was created by Young and/or should have been anticipated and avoided by Young and was not caused by the vessel a dn, therefore, does not in any event give rise to liability on the part of the vessel.

The defendant alternatively says plaintiff's negligence and/or the negligence of plaintiff's fellow employees caused the accident and/or plaintiff was contributorily negligent.

Finally, defendant says that plaintiff, and plaintiff's wife, have no right or cause of action against defendant, that defendant is entitled to a directed verdict, and that the alleged injuries sustained by plaintiff were and are not of a

permanent, total nature, and have been exaggerated by the plaintiffs.

c) Intervenor, Employers National Insurance Company:

That on or about June 23, 1982, Employers National Insurance Company, intervenor herein, a foreign corporation authorized to do business in the State of Louisiana, had in full force and effect a policy of insurance providing compensation under the Longshoremen's and Harbor Workers' Compensation Act issued to J. Young & Co. against liability under the aforesaid Act for any injury to the stevedoring co pany's employees occurring in the course and scope of their employment. That on or about June 23, 1982 plaintiff, Thomas J. Clanton, was an employee of J. Young & Co. and sustained an injury during the course and scope of his employment. That to date, intervenor, under the terms of its policy, pursuant to the provisions of the said Act, paid compensation benefits to plaintiff in the amount of $72,850.35 and has paid medical expenses incurred as a result of plaintiff's injury i the amount of $24,094.23. Both medical and compensation

figures may increase and these figures will accordingly be amended at time of trial. Intervenor is entitled under the Act to payment of the aforesaid amounts by preference out of any judgment rendered herein in favor plaintiff.

7.

Uncontested material facts:

a) At all times relevant, defendant owned the SS RENAICO;

b) On or about June 23, 1982, Thomas J. Clanton, was employed as a longshoreman with J. Young & Co., Inc.;

c) That on or about June 23, 1982 Employers National Insurance Company, intervenor herein, a foreign corporation authorized to do business in the State of Louisiana, had in full force and effect a policy of insurance providing compensation under the Longshoremen's and Harbor Workers' compensation Act issued to J. Young & Co., Inc. against liability under the aforesaid Act for any injury to the stevedoring company's employees occurring in the course and scope of their employment.

d) That on or about June 23, 1982 plaintiff, Thomas J. Clanton, was an employee of J. Young & Co., and sustained an injury during the course and scope of his employment.

e) That as a result of said injury, intervenor, under the terms of its policy, has to date, pursuant to the provisions of the Act, paid compensation benefits to plaintiff in the amount of $72,850.35 and has paid medical expenses in the amount of $24,094.23. The total lien of Employers thus being $96,944.58. Both medical and compensation figures may increase and these figures will accordingly be amended at time of trial.

8.

Single listing of contested issues of fact:

a) The negligence of defendants;

b) Causation:

c) Extent of plaintiff's injuries;

d) Amount of damages due plaintiffs;'

e) The negligence of plaintiff;

f) The contributory negligence of plaintiff;

g) The negligence of the fellow employees of plaintiff;

h) The negligence of the supervisors of plaintiff;

i) The alleged damages sustained by plaintiffs;

j) Whether the vessel had a list;

k) Whether the list caused the accident;

l) Whether the list was a proximate cause of the accident;

m) Whether the list was created by a stevedore;

n) Whether the list was open and obvious and easily avoidable by the stevedore;

o) Whether the list gives rise to a jury question with respect to the defendant under Section 905(b) of the Act;

p) Whether the defendant as a matter of law under the facts is entitled to a directed verdict;

q) The extent of the damages suffered by plaintiffs; if any;

r) Whether or not the doctrine of res ipsa loquitur is applicable.

9.

Contested issues of law:

a) Whether or not the doctrine of res ipsa loquitur is applicable;

b) All those issues of law implicit in the above stated issues of fact.

10.

Discovery:

Plaintiff intends to take the video deposition of Dr. J. Monroe Laborde on July 29, 1985 at 4:30 P.M. for use at trial.

11.

The following is a list of Exhibits which may be introduced by:

a) Plaintiffs:

1. Income tax returns and/or W-2 forms of plaintiffs;

2. Any and all medical and hospital records of plaintiff, Thomas J. Clanton, regarding treatment for his injuries sustained as a result of the accident, including medical bills incurred;

3. Personnel records of J. Young & Co. regarding plaintiff, Thomas J. Clanton;

4. Statements of any witnesses;

5. Deposition testimony of any witnesses;

6. Any and all accident reports;

7. Photographs;

8. Log books of the SS RENAICO, including, but not limited to, engineer's log, deck logs, stowage plans, cargo list and container list;

9. Documents pertaining to the sale of a taxi cab to plaintiff, Thomas J. Clanton;

10. File of the compensation carrier, Employers National Insurance Company, regarding Thomas J. Clanton;

11. Any exhibit listed or used by any other party.

Defendant, Compania Sud-Americana de Vapores, objects to any changes in the Pre-Trial Order from the original Pre-Trial Order,

including the addition of any new exhibits listed by plaintiffs.

b) Defendant, Compania Sud-Americana de Vapores:

1. Income tax returns and/or Social Security records of plaintiffs;

2. Statements of any witness;

3. Deposition of any witnesses, for impeachment purposes or for any other purpose;

4. Log books of the SS RENAICO;

5. Stowage plans of the SS RENAICO for the date in question;

6. Medical records of Dr. Harold M. Stokes;

7. Medical records of Dr. Harry L. Zengel, Jr.;

8. Medical records of Dr. J. Monroe Laborde;

9. Documents prepared by or on behalf of National Rehabilitation Services, Inc.;

10. Cargo manifests of the SS RENAICO;

11. Hatch list of the SS RENAICO;

12. Drawings by the plaintiff of the area of his alleged accident;

13. Records of prior lawsuits for personal injuries initiated by or on behalf of Thomas J. Clanton;

14. Medical records of any physician or medical facility which has rendered medical treatment to plaintiff at any time;

15. Records of Employers National Insurance Company and of J. Young & Co., Inc., in connection with the alleged accident and medical treatment rendered thereafter;

16. J. Young & Co., Inc., loading reports and booking lists;

17. J. Young & Co., Inc., work activity sheets and equipment rentals invoice;

18. J. Young & Co., Inc. accident/injury report; and

19. Any exhibit listed by any other party.

c) Intervenor, Employers National Insurance Company:

1. A copy of the policy insuring J. Young & Co.;

2. Copies of drafts issued in medical and compensation benefits;

3. Copies of medical bills covering treatment.

12.

Deposition testimony to be offered into evidence:

a) Plaintiffs:

Plaintiffs will offer the video taped deposition of Dr. J. Monroe Laborde. Additionally, plaintiffs may introduce the deposition testimony of any other witness whose deposition has been taken and who is either beyond the subpoena power of the Court and/or unavailable for trial.

b) Defendant, Compania Sud-Americana de Vapores:

The defendant will offer the deposition testimony of Captain Julio Orlandi and of any other witness

whose deposition has been taken and who is beyond the subpoena power of the Court and unavilable for trial.

13.

List and brief description of any charts, graphs, etc:

a) Plaintiffs:

Plaintiffs intend to use a blackboard and/or other charts or diagrams in opening statement and closing argument, as well as other illustrative materials and photographs.

b) Defendant, Compania Sud-Americana de Vapores:

The defendant may use a chart or diagram of the SS RENAICO and/or its cargo in either opening or closing argument.

14.

Witnesses:

a) Plaintiffs:

The following is a list of witnesses who will be called by the plaintiffs:

1. Plaintiff, Thomas J. Clanton;

2. Plaintiff, Gloria Hill Clanton.

The following is a list of witnesses who may be called by the plaintiffs:

1. Masker Walters, Jr., facts of the accident;
2. Jasper Powell, facts of the accident;
3. Melvin B. Honore, facts of the accident;
4. Willie Mack, III, facts of the accident;
5. John I. Aaron, facts of the accident;
6. Captain Certa, facts of the accident;
7. Jeffery Miller, facts of the accident;
8. Billy Ray Bridges, facts of the accident;
9. Gerardo Perez, facts of the accident;
10. Ricky Martinez, facts of the accident;
11. Reggie Martinez, facts of the accident;
12. August Miller, Jr., facts of the accident;
13. August Milelr, Sr., facts of the accident;
14. Henry Luthringhausen, facts of the accident;
15. Captain Pinado, facts of the accident;
16. Thomas J. Meunier, Jr., rehabilitation;
17. Steven Furst, rehabilitation and facts of the accident and medical benefits paid;

18. Judy Lide, American Rehab Services, rehabilitation;

19. Delores Shannon, American Rehab Services, rehabilitation;

20. Margot Hoffman, American Rehab Services, rehabilitation;

21. Richard Murray, rehabilitation and facts of the accident and medical benefits paid;

22. Thomas Monti, rehabilitation and facts of the accident and medical benefits paid;

23. J. Monroe Laborde, M.D., medical;

24. Neil H. Baum, M. D., medical;

25. Norman R. Galen, M.D., medical;

26. Harold Stokes, M.D., medical;

27. Seymour S. Goodman, Ph.D., economist;

28. Captain Julio Orlandi, cargo operations and facts;

29. Medical Records Librarian, Touri Infirmary, medical;

30. Any witness listed or called by any other party.

Defendant, Compania Sud-Americana de Vapores, objects to any changes or additions to the Pre-Trial Order from the original Pre-Trial Order, including any changes to the witnesses listed by plaintiffs. In the event that plaintiffs are entitled to list any additional witnesses to this Pre-Trial Order, defendant would, likewise, desire to add additional witnesses.

b) Defendant, Compania Sud-Americana de Vapores:

The following is a list of witnesses who will be called by defendant:

1. Captain Julio Orlandi, Bina del Mar, Chile - cargo operations involving the SS RENAICO on or about June 23, 1982, by deposition if he is not otherwise available.

The following is a list of witnesses who may be called by defendant:

1. Thomas J. Meunier, Jr., rehabilitation specialist, Baton Rouge, LA - rehabilitation efforts involving plaintiff;

2. Mr. Steven Furst, 4425 Perkins, Metairie, LA - rehabilitation efforts involving plaintiff, facts of the accident, compensation and medical benefits paid to plaintiff;

3. Dr. Harry L. Zengel, Jr., 4440 Magnolia Street, New Orleans, LA - plaintiff's medical condition prior to the alleged injury on the SS RENAICO;

4. Dr. Harold M. Stokes, 2633 Napoleon Avenue, New Orleans, LA - plaintiff's medical condition prior to his alleged injury on the SS RENAICO;

5. Jorge Cerda, Valparaiso, Chile - cargo operations involving the SS RENAICO on or about june 23, 1982;

6. Gerardo Perez, Valparaiso, Chile - cargo operations involving the SS RENAICO on or about June 23, 1982;

7. August Miller, Jeffrey Miller and/or George Simno, New Orleans, LA - loading operations aboard the SS RENAICO on the day of plaintiff's alleged injury;

8. Captain Barth Reed, New Orleans, LA - cargo operations aboard the SS RENAICO;

9. CAPTAIN RENATO PINEIDA, NEW ORLEANS, LA - CARGO OPERATIONS ABOARD THE SS RENAICO;

10. Dr. J. Monroe Laborde, 3525 Prytania Street, New Orleans, LA - plaintiff's medical condition;

11. Medical Records Custodian of Southern Baptist Hospital, New Orleans, LA - medical records pertaining to plaintiff;

12. Representative of Cooper Stevedores and/or Employers National Insurance Co. or Employers Casualty Co. - plaintiff's medical condition;

13. John Aaron, New Orelans, LA - facts of the alleged accident;

14. Melvin B. Honore, 1734 Bartholomew Street, New Orleans, LA - facts of the alleged accident;

15. Jasper Powell, 900 Claiborne Drive, Jefferson, LA - facts of the alleged accident;

16. Willie Mack, 2402 Gallion, New Orleans, LA - facts of plaintiff's alleged accident;

17. Billy Ray Bridges, 236 Butler Drive, Avondale, LA - facts of plaintiff's alleged accident.

c) Intervenor, Employers National Insurance Company:

The following is a list of witnesses who will be called by intervenor:

1. A representative of Employers National Insurance Company to testify as to compensation and medical benefits provided to plaintiff.

The following is alist of witnesses who may be called by intervenor:

1. May call any other witness listed or called by any other party.

15.

This is a jury case. A jury is applicable to all aspects of this case. Proposed jury instructions and any special questions that the Court is asked to put to prospective jurors on voir dire shall be delivered to the Court and opposing counsel not later than one prior to the trial date, unless specific leave to the contrary is granted by the Court.

16.

The issue of liability will not be tried separately from that of quantum.

17.

There are no matters which would expedite the disposition of this case.

18.

A realistic estimate of the number of trial days required is 2 days. Trial of this case is hereby set for the _____ day of _____, 1985, at _____ o'clock A.M.

19.

This pre-trial order has been formulated by counsel for all parties. Reasonable opportunity has been afforded counsel for corrections or additiona prior to signing. Hereafter, this Order will control the course of the trial and may not be amended except by consent of the parties and the Court or by Order of the Court to prevent manifest injustice.

20.

Possibility of settlement of this case was (was not) considered.

NEW ORLEANS, LOUISIANA, this 23rd day of July, 1985.

s/Illegible Signature
UNITED STATES DISTRICT JUDGE

Respectfully submitted,

DARRYL J. TSCHIRN

JOHN M. ROBIN

WILLIAM E. WRIGHT

GARY A. HEMPHILL

DOUGLAS P. MATTHEWS

NO. 83-432
SECTION "G"

CLERK'S OFFICE
A TRUE COPY
JANUARY 9, 1986
s/Illegible Signature
Deputy Clerk United States
District Court
Eastern District of Louisiana
New Orleans, LA

PLAINTIFFS	DEFENDANTS
GLORIA HILL, wife of/and THOMAS J. CLANTON	THE CHILEAN LINE and the VESSEL S.S. RENAICO * COMPANIA SUD-AMERICANA DE VAPORES

INTERVENOR 9/14/83:
EMPLOYERS NATIONAL INSURANCE COMPANY

*Owner: COMPANIA SUD-AMERICANA DE VAPORES

CAUSE
(CITE THE U.S. CIVIL STATUE UNDER WHICH THE CASE IS FILED AND WRITE A BRIEF STATEMENT OF CAUSE

NO STATUTE SPECIFIED - PERSONAL INJURY RESULTING IN LOSS OF SALARY

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FOR: PLTFS

DATE	NR.	PROCEEDINGS
1/28/83	1	COMPLAINT - 1 summs issd.

1/28/83 2 Pltf's mtn & ORDER appointing Franklin Augustus as process server.

2/17/83 3 ANSWER of Compania Sud-Americana de Vapores as owner of SS RENAICO to pltf's complt.

2/17/83 4 Deft's Ntc of Depos of pltf, 5-10-83.

2/17/83 5 Deft's req for prod & inspection of doc to pltf.

2/17/83 6 Deft's interrogs to pltf.

2/22/83 7 Ret on S&C svd on Chilean Line 3/7/83.

2/24/83 8 Defts mtn & ORDER that Chilean Line is hereby dismissed & Compania Sud-Americana de Vapores is substituted as deft. (MLS) dktd 2/26/83

3/8/83 9 Prel conf set before Mag Johannesen 3/29/83, 9:45 a.m. (MLS) dktd 3/8/83.

3/31/83 10 M.E. 3/29/83: Conf held this date; further conf set 6/28/83, 9:30 a.m. (10J) dktd 3/31/83.

5/10/83 11 Answers of pltfs to interrogs of defts.

5/17/83 12 Defts' req & issg of 3 subps.

5/17/83 13 Deft's ntc of depo of Malvin Honore, Willie Mack III & John I. Aaron 6/1/83.

5/24/83 14 Pltf's interrgs to Chilean Line

5/24/83 15 Rtn of subp to John Aaron & Melvin Honore svd 5/18/83

5/25/83 16 Depo of Thomas Jefferson Clanton taken 5/10/83

6/28/83 17 M.E. 6/28/83: Prel PTC held this date; amends by 8/1/83: final PTC 11/25/83, 9 a.m.; TRIAL w/JURY 12/5/83, 8:30 A.M. (10J) Dktd 6/29/83.

7/12/83 18 Req of pltfs for prod of docs to deft.

7/12/83 19 M.E. 7/12/83: ORDERED that PTC be set 11/22/83, 9:30 a.m. (MLS) dktd 7/14/83.

7/19/83 20 Deft's answer to pltf's interrogs.

9/14/83 21 Mtn of Employers Nat'l Ins Co. & ORDER granting leave to file intervening ocmplt. (PEO 9/15/83, dktd 9/19/83.

9/16/83 22 Employers National Ins Co's intervening complt.

9/26/83 23 Pltf's list of witnesses.

9/26/83 24 Pltf's mtn for order compelling discovery; hrg set 9/19/83, 9 a.m. before Mag.

9/26/83 25 Pltf's mtn to extend date to exchange expert reports' hrg set 9/19/83, 9 a.m. before Mag.

9/28/83 26 Deft's list of witnesses.

10/19/83 27 M.E. 10/18/83; Hrg on pltf's mtn for order compelling discovery; mtn to ext date to exchange expert reports; dismissed moot (Mat. Meyer) dktd 10/20/83.

10/28/83 28 Deft's ntc of depo of Capt Julio O. Zuezada 10/31/83.

10/28/83 29 Deft's req & issg of 1 subp.

11/3/83 30 Ret on subp svd on Masker Walters Jr. 11/1/83.

11/3/83 31 Joint mtn & ORDER that TRIAL & PTC be CONT'D to be reset at stat conf. (MLS) dktd 11/7/83.

11/7/83 32 M.E. 11/4/83: ORDERED that TRIAL is CONT'D to 7/9/84, 8:30 w/jury; final PTC 7/2/84, 9 a.m. (MLS) dktd 11/8/83.

2/1/84 33 Deft's ntc of depo of Capt Certa 2/14/84.

5/31/84 34 Compania Sud-Americana De Vapores' Ntc of Depos of Dr. Harold Stokes on 6/13/84.

6/1/84 35 Deft's ntc of depos of the Medical Records Custodian of the Southern Baptist Hosp. on 6/13/84.

6/1/84 36 Deft's request for an issd 1 subp.

6/11/84 37 Deft's ntc of depos of Dr. J. Monroe Laborde on 6/12/84.

6/11/84 38 Pltf's request for an issd 3 subp.

6/12/84 39 Pltfs' ANSWER to intervening compl. of Employers National Ins. Co.

6/19/84 40 RTN on Subps to Dr. Norman R. Galen, Dr. Neil H. Baum & Dr. J. Monroe Laborde, Svd 6/12/84.

6/25/84 41 Pltf's req. & issuance of 3 subps.

7/2/84 42 M.E. TRIAL is CONTINUED w/o date to permit pltf addt'l time to obtain counsel (MLS) DKTD 7/5/84

7/3/84 43 RTN on Subps to Malvin B. Honore, Dr. Melville Z. Wolfson & JOhn I. Aaron, Svd 6/25/84.

7/13/84 44 ORDERED that pltf to appear on 7/25/84 at 9:15 a.m. bfr Judge (AJM) 7/12/84 DKTD 7/16/84.

7/17/84 45 Donald M. Pierce mtn & ORDER to withdraw as counsel of record for pltf. (MLS) 7/8/84 Kdtd 7/23/84.

7/25/84 46 PLTFS TO SHOW CAUSE Pltfs Present, Cou- questions and advises the deft concerning their case and the hiring of counsel Pltf inform the court they intend to hire court to be informed within two weeks. in not case will be re-instated back on trial calender. Dktd 7/27/84.

9/25/84 48 Pltf's mtn and ORDER that Darryl J. Tschirn and Richard L. Greenland are enrolled as counsel of record for the pltfs'. (MLS) 9/24/84 dktd 9/26/84.

9/28/84 49 Ntc of prel conf set 11/20/84 at 9:30 am bfr Mag. Meyer.

11/27/84 50 M.E. (Mag. Meyer) 11/20/84; Prel PTC held, amends, etc by 4/5/85, final PTC set 5/10/85 at 9

am bfr Judge, JURY TRIAL set 5/23/85 at 8:30 am bfr Judge. dktd 11/28/84.

11/27/84 51 M.E. 11/20/84 (Mag. Meyer) Settlement conf set 2/28/85 at 3 pm bfr Mag. Meyer. dktd 11/28/84.

3/11/85 52 Pltf Thomas Clanton's witness list.

3/12/85 53 Witness list of The Chilean Line.

5/10/85 54 PTO: PTC held. TRIAL w/jury - no date set. (MLS) dktd 5/10/85.

5/13/85 55 Req by deft for subps; 6 issd.

5/14/85 56 Req of deft for subps; 2 issd.

5/15/85 57 Return on subp to Capt. Renato Pineida, Stephen V. Furst, Billy Ray Bridges, Jasper Powell, Jeffrey Miller & Harry L. Zengel, Jr., M.D., all svd 5/14/85

5/15/85 58 Req by deft for subps; 1 issd.

5/15/85 59 Pltfs' req for subps; 25 issd.

5/16/85 60 Req by deft for subps; 1 issd.

5/16/85 61 Req by deft for subps; 2 issd.

5/16/85 62 Return on subp to John Irven Aaron & J. Young & Co. svd 5/15/85.

5/15/85 63 Mtn of Darryl Tschirn & Richard Greenland, Esqs. & ORDER that John Robin be added as co-counsel for pltfs. (MLS) dktd 5/17/85.

5/16/85 64 Req by deft for subps; 1 issd.

5/17/85 65 Proposed jury charges by deft.

5/17/85 66 Suggested questions by deft to jury on voir dire examination.

5/17/85 67 Return on subp to Thomas Clanton, Dr. Stuart I. Phillips, & Stephen Furst svd 5/16/85.

5/17/85 68 Req by deft for subps; 3 issd.

5/17/85 69 Pltfs' Mtn & ORDER that TRIAL set for 5/23/85 is CONTINUED. (MLS) dktd 5/20/85.

5/20/85 70 Return on subp to Masker Walters, Jr. & Malvin Honore svd 5/17/85.

5/29./85 71 M.D. : 7/28/85; ORDER that TRIAL w/jury is CONTINUED TO 8/5/85 8:30 am. Final PTC is set for 7/22/85 9:40 am (MLS) dktd 5/29/85.

6/3/85 72 Ntc by deft of Depos of Jeffrey Miller, Masker Walters, Jr., Stephen V. Furst, Jasper Powell, Willie Mack, III, Billy Ray Bridges & Gerardo Perez all on 6/18/85.

6/3/85 73 Req by deft for subps; 6 issd.

6/4/85 74 Return on subp to Jeffrey Miller svd 6/4/85.

6/5/85 75 Return on subp to Jasper Powell, Masker Walters, Jr. & Billy Ray Bridges all svd 6/4/85; to Stephen V. Furst svd 6/5/85.

6/11/85 76 Rule 45(d) objection of Employers National in resp. to subp. issd. at defts. req.

6/18/85 77 Return on subp to Stephen V. Furst, Willie Mack, III, Jasper Powell, Masker Walters, Jr. & Bill Ray Bridges svd 6/18/85.

6/27/85 78 Ntc of Compania Sud-Americana De Vapores of depos of Jeffrey Miller on 7/1/85.

7/1/85 79 Return on subp to Jeffrey Miller svd 7/1/85.

7/1/85 80 Pltf's req for subps; 6 issd.

7/1/85 81 Pltfs' mtn for leave to amend witness list & order DENYING same. (MLS) 7/3/85 dktd. 7/3/85.

7/5/85 82 Pltfs' Mtn & ORDER that PTC set for 7/22/85 be CONTINUED to 7/23/85 9:20 am (MLS) 7/8/85 dktd 7/8/85.

7/9/85 83 Retorn on subp to Capt. Pinado & Henry Luthringhausen svd 7/2/85; to August Miller, Jr., Ricky Martinez, August Miller, Sr. & Reggie Martinez svd 7/3/85.

7/11/85 84 Req by deft for subps; 3 issd.

7/15/85 85 Req by deft for subps; 4 issd.

7/15/85 86 Retorn on subps to Dr. Harry L. Zengel, Jr. svd 7/11/85; Thomas Clanton svd 7/12/85; & Dr. Stuart Phillips svd7/11/85.

7/16/85 87 Return on subp to Dr. J. Monroe Laborde & Malvin B. Honore svd 7/16/85.

7/17/85 88 Return on subp to John I. Aaron & Cost of Recds. of Employers National Ins. Co. svd 7/16/85.

7/17/85 89 Pltfs' Mtn & ORDER allowing depos of Dr. J. Monroe Laborde to be recorded by video tape. (MLS) dktd 7/18/85.

7/18/85 90 Pltfs' Ntc of Depos of Dr. J. MOnroe Laborde on 7/29/85.

9/22/85 91 Memo of deft in Oppos to pltf's mtn to amend witness list.

7/23/85 92 PRE-TRIAL ORDER. PTC held this date; Trial w/jury. (MLS) DKTD 7/23/85.

7/17/85 89A Pltfs' mtn and ORDER that expedited hrg on pltfs' mtn to allow pltf to amend witness ist is set for 7/23/85 at 9:20 a.m. (MLS) 7/19/85 dktd 7/23/85.

7/22/85 91A Pltfs' mtn to allow pltf to amend witness list. Hrg set 7/23/85 at 9:20 a.m. before Judge.

7/22/85 91B Req of deft for subps; 3 issd.

7/24/85 93 Return on subp to Custodian of Records, J. Young & Co., svd 7/23/85.

7/29/85 94 Return on subp to Douglas P. Matthews & Stephen Furst svd 7/26/85.

7/30/85 95 Memo of law of Compania Sud-Americana de Vapores.

7/30/85 96 Suggested Questions to jury on voir dire exam of Compania Sud-Americana de Vapores.

7/30/85 97 Proposed jury charges of Compania Sud-Americana de Vapores.

8/5/85 98 Pltfs' requested jury charge.

8/5/85 99 NON JURY TRIAL: Witnesses sworn & testified. Court recesses until 8/6/85 at 9:30 a.m. Court adjourns. dktd 8/6/85.

8/6/86 100 NON JURY TRIAL: All present & ready. Witnesses sworn & testified. Deft orally moves for invol dismissal - submitted. Exhibits offered. Court recesses until 8/7/85 at 10:00 a.m. Court adjourns. dktd 8/7/85.

8/7/85 101 NON JURY TRIAL: Cont from 8/6/85. All present & ready. Court GRANTS deft's mtn for invol dismissal. Court dictates findings & fact & conclusions from bench. Judgment in favor of defts. Court adjourns. dktd 8/7/85.

8/8/85 102 JUDGMENT: Ordered in favor of Compania Sud-Americana De Vapores & Vessel S.S. Renaico & agst pltfs dismissing pltfs' suit at their costs. Further ORDER that intervention of Employers Nat'l Ins. Co. is dismissed as moot. (CLERK - Approved MLS) dktd 8/8/85.

CLOSED CASE

8/16/85 103 Pltfs' Mtn for new trial w/jury. Hrg set for 9/4/85 9:15 am before Judge.

8/26/85 104 Memo of Compania Sud-Americana de Vapores in Oppos to pltfs' mtn for new trial w/jury.

9/4/85 105 Hrg on Pltfs' mtn for new trial w/jury - DENIED. dktd 9/5/85.

9/17/85 106 Pltfs' notice of appeal of judgment entered 8/8/85.

9/18/85 parties (dlm)	xx	Notice of Appeal forwarded to all
10/11/85 Tschirn.	107	Transcript order form by Darryl J.
11/25/85 - Vol. III.	108	Transcript of ruling before Judge Sear
12/20/85 before Judge Sear.	109	Transcript of proceedings held 8/6/85
1/8/86 before Judge Sear.	110	Transcript of proceedings held 8/5/85

FILED
AUG 15 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-166

In The
Supreme Court of the United States
October Term, 1987

—o—

GLORIA HILL, Wife of/and THOMAS J. CLANTON,
Petitioners,

vs.

THE CHILEAN LINE, VESSEL SS RENAICO,

and

COMPANIA SUD-AMERICANA DE VAPORES,
Respondents.

—o—

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

—o—

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COUNTERSTATEMENT OF QUESTIONS FOR REVIEW

The question presented, we suggest, should more appropriately and accurately be stated: Is there a right to jury trial where the complaint and pretrial order expressly set forth claims for relief in admiralty and invoke the admiralty and maritime jurisdiction of the court; no amendment nor request to amend is made to withdraw the statement identifying the claims as admiralty and maritime; and the party who now complains of the case's having been tried without a jury acquiesced in, and did not object to, the non-jury bench trial in admiralty?

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Goldsby v. The Celotex Corporation, 591 F.Supp. 615 (W.D.Mo. 1984) 5

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LITERATURE

Gilmore and Black, *The Law of Admiralty* (2d Ed. 1975) 4

STATEMENT OF THE CASE

The petitioners, a longshoreman and his wife, were employed by J. Young & Co., Inc., an independent contract stevedore, expressly set forth in the complaint an admiralty and maritime claim, and expressly invoked the admiralty and maritime jurisdiction of the court, against the vessel RENAICO and against The Chilean Line, as owner of the RENAICO, to recover for personal injuries sustained by him June 23, 1982, when cargo being loaded aboard the RENAICO by J. Young & Co., Inc. fell and injured plaintiff's leg.[1]

The pretrial order likewise expressly recited that jurisdiction was based upon the general maritime law.[2]

On Sunday, August 4, 1985, the day before the trial in the district court, the trial judge, the Honorable Morey L. Sear, originated from his chambers a conference call with the attorneys for petitioners and for respondents and informed them that the court had reviewed the complaint and the pretrial order, had read the decision of the Court of Appeals for the Fifth Circuit in the case of *T.N.T. Marine Service, Inc. v. Weaver Shipyards*, 702 F.2d 585 (5th Cir. 1983), *cert. denied* 464 U.S. 847 (1983); and that he wished to discuss the applicability of that decision to this case. Judge Sear was clear: he felt obligated to inform the parties that, in his opinion, jurisdiction rested in admiralty; that, in view of the wording of the complaint and of the pretrial order, and in light of the *T.N.T.* decision, there

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1. Vol. 1, R.A., p. 1.

2. Vol. 1, R.A., p. 158; Vol. 2, p. 311.

was no right to try the case as a civil action with a jury. Petitioners' attorney at first protested against a bench trial in admiralty without jury, but the judge, for the benefit of petitioners' counsel, and for completeness and orderly procedure, said that he would entertain briefs and oral arguments on the issue at 8:00 a.m., Monday, August 5, 1985. He also stated that, in the meanwhile, he would maintain the case as a jury trial to begin at 10:00 a.m. that Monday morning, and would render a final decision whether to proceed with or without a jury after the 8:00 a.m., Monday, argument. However, petitioners' attorney, in that conference telephone call, Sunday, August 4, stated that petitioners did not wish to brief or argue the point, but would agree to allow the case to proceed as a non-jury bench trial in admiralty. Moreover, on the morning of the trial, when the case was called at 10:00 a.m., the trial proceeded as a non-jury bench trial in admiralty, without the slightest hint of objection by petitioners.[3]

REASONS WHY THE CASE SHOULD NOT BE REVIEWED BY THIS COURT

No constitutional issue is in any way involved, and petitioners' assertion that one is has no basis at all. Petitioners were not entitled to a jury trial. Furthermore, petitioners did not preserve any constitutional issue when they did not amend or attempt to amend the complaint, but proceeded to trial before the court without a jury without rais-

3. Vol. 2, R.A., p. 380.

ing or even hinting objection to the case proceeding as a non-jury bench trial in admiralty.

———o———

ARGUMENT

No constitutional issue was ever involved and none was preserved. Petitioners consented to try the case as a non-jury bench trial in admiralty.

Rule 9(h) of the Federal Rules of Civil Procedure provides that a pleading

> ". . . within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims."

Rule 38(e) of the Federal Rules of Civil Procedure provides that the identification of a claim as an admiralty or maritime claim carries with it the procedural consequence of a non-jury trial, reciting, in pertinent part, that the Rules are not to be construed—"shall not be construed"—to create

> "a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h)."

See also, Rule 8(e)(1), providing that no "technical forms of pleading or motions are required."

With the unification of the admiralty rules, it was necessary to preserve those historical procedures that tra-

ditionally attach to actions in admiralty, not the least of which was the non-jury trial. *See*, Fed.R.Civ.P. 9(h) Advisory Committee Notes. The solution, simple in nature, that was applied was the preservation in Rule 9(h) of the petitioners' right to choose the procedural consequences of a civil or of an admiralty action, by choosing the jurisdictional basis of the action and designating that basis in the complaint. This solution complied with the existing procedural choice provided by the "saving to suitors" clause, codified in 28 U.S.C. 1333(1), the effect of which is that a suitor who holds an *in personam* claim, which might be enforced by a suit *in personam* in admiralty, may also, at his election, file suit at "common law," by the filing of an ordinary civil action, in state court or in federal court (as to the latter, given diversity and jurisdictional amount), without reference to admiralty. Gilmore and Black, *The Law of Admiralty* (2d Ed. 1975), p. 37. Rule 9(h), in providing that a reference to admiralty resulted in the invocation of admiralty procedure, was designed to mandate, and does mandate, that all suits invoking admiralty jurisdiction continue to carry with them the election of the procedural consequences attendant upon all admiralty cases, and admiralty procedure, notwithstanding the unification of civil and admiralty rules.

The complaint in this case, as well as the pretrial order, specifically invoked, pursuant to Rule 9(h), *supra*, the admiralty and maritime jurisdiction of the district court. In fact, in the very first paragraph, the complaint alleges:

> "The jurisdiction of this Court is based upon the general maritime law and all statutes and laws of the

> United States pertinent thereto and the damages herein exceed $10,000 per complainant."[4]

The pretrial order recites in paragraph 4:

> "Jurisdiction in this matter is based upon the General Maritime Law, as well as diversity of citizenship and jurisdictional amount. Jurisdiction is uncontested."

Therefore, when plaintiffs invoke the court's admiralty and maritime jurisdiction, as petitioners did in this case, the case is a non-jury case in admiralty, and this is in no way altered by the fact that the petitioners seek to confuse the situation by alleging diversity and requesting a jury. *Durden v. Exxon Corp.*, 803 F.2d 845 (5th Cir. 1986); *T.N.T. Marine Service, Inc. v. Weaver Shipyards*, 702 F.2d 585 (5th Cir. 1983), *cert.denied* 464 U.S. 847 (1983); *Fisher v. Danos*, 671 F.2d 904 (5th Cir. 1982); *William P. Brooks Construction Co. v. Guthrie*, 614 F.2d 509 (5th Cir. 1980); *Romero v. Bethlehem Steel Corp.*, 515 F.2d 1249 (5th Cir. 1975); *Goldsby v. The Celotex Corporation*, 591 F.Supp. 615 (W.D.Mo. 1984); *Oroco Marine, Inc. v. National Marine Service, Inc.*, 71 F.R.D. 220 (S.D. Tex. 1976); *Gilmore v. Witschorek*, 411 F.Supp. 491 (E.D.Ill. 1976); *Williams v. The Shipping Corporation of India, Ltd.*, 354 F.Supp. 626 (S.D.Ga. 1973); *Anderson v. The American Oil Company of Baltimore, Maryland*, 60 F.R.D. 676 (S.D.Ga. 1973); *Alaska Barite Co. v. Freighters Incorporated*, 54 F.R.D. 192 (N.D. Cal. 1972); *Americana of Puerto Rico, Inc. v. Transocean Tankers Corp.*, 317 F.Supp. 798 (D.P.R. 1969); *Banks v. Hanover Steamship Corp.*, 43 F.R.D. 374 (D.Md. 1967).

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4. Vol. 1, R.A., p. 1.

Petitioners also contend that the case should have been tried to a jury because the pretrial order referred to a jury and the case was originally assigned as a jury trial. A review of the pretrial order reveals that the parties stipulated the court's admiralty and maritime jurisdiction,[5] and, consequently, under the jurisprudence outlined above, the reference in the pretrial order to a jury trial was ineffectual surplusage and of no consequence.

The petitioners, therefore, were not entitled to a jury trial, and the district court was correct in holding the trial as a non-jury trial in admiralty. When petitioners alleged in the complaint, and repeated in the pretrial order, that the claim was one of admiralty jurisdiction, they were required thereafter to follow and to accept all the procedural consequences of the jurisdictional choice they had made; one of the first and most elementary of which was trial by the admiralty judge and not by jury.

The petition in this Court contains statements entirely outside the record, and relating to a telephone conference, Sunday, August 4, 1985, which require respondents to respond, particularly in view of petitioners' gratuitous and untrue statement the case proceeded to trial without a jury "over counsel for [petitioners'] objection"; and that "no record was made of such since it was Sunday afternoon on the eve of trial and counsel for petitioners received the telephone call at his home."

The telephone conversation was a three-way conference call, originated by the court from chambers. The court advised the attorneys for both parties that the court

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5. Vol. 1, R.A., p. 158; Vol. 2, p. 311.

was of the opinion, in light of the Fifth Circuit decision in the *T.N.T. Marine Service* case, *supra,* that the case should be tried as a non-jury trial in admiralty, and directed that the issue be briefed and argued before the court at 8:00 a.m. on Monday, August 5, to permit the court to make a final ruling on the issue in time to proceed with a jury trial at 10:00 a.m. if that proved to be the final ruling. Counsel for petitioners replied by stating that they would not contest the case being held as a non-jury bench trial in admiralty. Accordingly, when the trial commenced at 10:00 a.m. on Monday, August 5, it proceeded as a non-jury bench trial, without objection and without so much as a hint of any objecting comment from petitioners. The case, therefore, properly proceeded as a non-jury trial: first, because petitioners, as a matter of law, were not entitled to jury trial; second, because, during the pretrial telephone conference the day before, petitioners expressly waived whatever right they might have had; and, finally, because they made no objection to the bench trial in admiralty on the morning of the trial. A plaintiff waives a previously requested right to jury trial when he proceeds to trial before the court without objecting. A *post hoc* challenge of the court's proceeding without a jury is not permitted. *Bass v. Hoagland,* 172 F.2d 205 (5th Cir. 1949), *cert.denied* 338 U.S. 816 (1949); *National Family Insurance Co. v. Exchange National Bank of Chicago,* 474 F.2d 237 (7th Cir. 1972) *cert.denied* 414 U.S. 825 (1972); *Chapman v. Kleindienst,* 507 F.2d 1246 (7th Cir. 1974); *Southland Reship, Inc. v. Flegel,* 534 F.2d 639 (5th Cir. 1976). The rationale of these holdings is obvious: a party cannot be allowed to build error into the trial by his own waiver and inaction.

In view of this, petitioners were not entitled to a jury trial; the holdings of the lower courts were not erroneous. No constitutional issue is involved. Alleging in the complaint that the claim was in admiralty, the petitioners took upon themselves, and were required thereafter, to follow all of the procedural consequences of their jurisdictional choice. One of the first and most elementary of these was trial by the admiralty judge and not by jury. The pretrial order confirmed petitioners' claim that the case was one grounded in admiralty under the general maritime law. They at no time amended the complaint as they would have been required to do as prerequisite to a belated effort to get a jury trial. Finally, they accepted and acquiesced in the case's being tried as a non-jury trial in admiralty, and thus waived any right they might have had—and they had none—to try the case before a jury.

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CONCLUSION

We submit that no constitutional issue is involved. The petitioners were not entitled to a jury trial, and the district court, and the Court of Appeals, were correct in concluding that the case was properly one for trial as a bench trial in admiralty. Further, no issue regarding petitioners' right to a jury trial was preserved, because petitioners consented to try the case as a non-jury admiralty matter.

The petitioners have had their day in court. The judgments of the lower courts are correct, and there is no justification for the issuance of a writ.

Respectfully submitted,

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